5-23-07

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MATTHEW BRIAN YOAK, M.D.,

Plaintiff,

v.

CIVIL ACTION NO. 06-C-957
(Judge: David M. Pancake)

MARSHALL UNIVERSITY BOARD OF GOVERNORS; UNIVERSITY PHYSICIANS AND SURGEONS, INC.; and DAVID A. DENNING, M.D.

Defendant.

ORDER

This matter came before this Court on the Defendants, Marshall University Board of Governors, University Physicians and Surgeons, Inc, and David A Denning, M.D.'s Motion to Dismiss under Rules 12(b)(1) and (6) of the West Virginia Rules of Civil Procedure. Having considered the Motion, Memorandum in Support, Response of Plaintiff, argument of counsel, and appropriate legal authority, and for the reasons more fully setforth herein, the Defendants' Motion to Dismiss is hereby **GRANTED**.

THE STANDARD FOR A MOTION TO DISMISS

A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. See Collia v. McJunkin, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 303 (1987); Mandolitis v. Elkins Industries, Inc., 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute see Gallapoo v. WalMart Stores, 197 W. Va. 172, 475 S.E.2d 172 (1996)). A motion to dismiss enables a court to weed out unfounded suits. Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104 (1996). The primary purpose of a motion to dismiss is to seek a determination of whether the plaintiff is entitled to offer evidence in support of the

claims made in the complaint. Dimon v. Mansey, 177 W.Va. 50, 52, 479 S.E.2d 339 (1996). Although a motion to dismiss for failure to state a claim is viewed with disfavor, if a plaintiff's complaint states no cause of action upon which relief might be granted, then the defendants' motion to dismiss should be granted. See Fass v. Nowsco Well Services, Ltd., 350 S.E.2d 562, 564 (1986). Governmental immunities are properly determined pursuant to a motion to dismiss because the purpose of such immunities is to protect governmental officers from being subjected to suit. See Hutchinson v. Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996). "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subjected to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry in to the merits into the case." Id. (Citing Swint v. Chambers County Comm., 514 U.S. 35 (1995)). This includes the burden of discovery. See Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1185 (10th Cir. 2001).

FINDING OF FACTS[1]

The Plaintiff is a medical doctor who resides in Williamstown, West Virginia. See Complaint at ¶ 4. He was appointed as an Assistant Professor of Surgery at the Joan C. Edwards School of Medicine ("SOM") in July, 2002. See id. at ¶ 10. His initial appointment ran from July 1, 2002 to June 30, 2003. See id. In addition to the appointment with the SOM, the Plaintiff received an appointment to practice medicine with University Physicians & Surgeons ("UP&S"). See id. These appointments were renewed annually, up to and including, an appointment from July 1, 2004 to June 30, 2005. See id.

[1] The allegations in the Complaint are taken as true solely for the purpose of this Order.

On November 17, 2004, the Plaintiff gave notice that he was resigning his appointment with both the SOM and UP&S. See id. at ¶ 13. This notice constituted a breach of any employment contract between the Plaintiff and the Defendants. On November 19, 2004, the Defendants chose to terminate the Plaintiff's employment effective December 3, 2004, rather than December 31, 2004, as suggested by the Plaintiff. See Complaint at ¶ 17. The Plaintiff alleges these actions were unlawful and without justification. He further alleges that Dr. Denning's actions "were taken with full knowledge of the illegality and were motivated by actual malice." Complaint at ¶ 17.

Additionally, the Plaintiff alleges a cause of action for the failure of the Defendants to remove his name from its web site in a timely manner and for negligence in reporting his credentials.

PROCEDURAL HISTORY

The Plaintiff originally filed this action in Kanawha County on May 9, 2005. The Defendants filed a Motion to Dismiss based on improper venue, failure to provide statutorily required pre-suit notice, qualified immunity, and failure to state a claim upon which relief may be granted. On July 14, 2006, the Court entered an Order granting the Defendants' Motion on all grounds and dismissing the action with prejudice. After the Order was entered dismissing the action, the Plaintiff filed a Motion for Relief from Judgment arguing that the dismissal should have been without prejudice because granting the Motion to Dismiss based on failure to provide pre-suit notice deprived the Court of jurisdiction over the other arguments. On October 17, 2006, the Court entered an Order dismissing the action without prejudice. On October 23, 2006, the Plaintiff filed a new action in the Kanawha County Circuit Court. On December 12, 2006, the

Court granted a joint Motion to Transfer, and the case was transferred to Cabell County.

CONCLUSION OF LAW

A. The Plaintiff's Complaint must be dismissed because these Defendants are entitled to qualified immunity from suit.

The common law doctrine of qualified immunity is designed to protect public officials from the threat of litigation resulting from difficult decisions which must be made in the course of their employment. See e.g., Clark v. Dunn, 195 W.Va. 272, 465 S.E.2d 374 (1995). To sustain a viable claim against a State agency or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996); Clark, 465 S.E.2d 394 (citing State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1991)). In other words, the State, its agencies, officials and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they are not violating any known law or acting with malice or bad faith. Syl. pt. 8, Parkulo.

The Plaintiff does allege that these Defendants acted "unlawfully, and without justification or compliance with applicable procedure." See Complaint at ¶¶ 14, 15, and 16. The Plaintiff also alleges that these Dr. Denning's actions "were taken with full knowledge of their illegality and were motivated by actual malice." Complaint at ¶ 17. The Plaintiff has not alleged that the Defendants' actions violated any clearly established statutory or constitutional rights of which a reasonable person in Dr. Denning's position would have known about. While the

Plaintiff has alleged that Dr. Denning's actions were taken with actual malice, the simple use of the word malice is insufficient to overcome the Defendants entitlement to qualified immunity. See Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1996)(stating that for a right to be clearly established, it must be established in a particularized and relevant sense, not merely as an overarching entitlement to due process.")

The common law doctrine of qualified immunity was scrutinized and analyzed in detail by the West Virginia Supreme Court of Appeals in State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1992). There, the State brought suit against Chase Securities, Inc. ("Chase"), a brokerage company, to recover damages for losses sustained by the Consolidated Fund. Id. at 357, 242 S.E.2d at 592. Chase filed a third-party complaint against members of the State Board of Investments ("Board"), alleging that Board members' approval of certain large transactions which resulted in financial losses to the State rendered liable the Board members. Id. The Circuit Court of Kanawha County dismissed Chase's third-party complaint against the Board on the ground that it was immune from suit, and Chase appealed. The West Virginia Supreme Court of Appeals upheld the State Board's dismissal from suit, finding that the members of the Board were entitled to qualified immunity for the discretionary decisions that they made regarding investment transactions. Id. at 362, 424 S.E.2d at 597. The Court relied upon discussions from federal courts on the purpose of qualified immunity and commented that qualified immunity is designed to "insulate the decision making process from the harassment of prospective litigation." Id. at 361, 424 S.E.2d at 596. "The provision of immunity rests on the view that the threat of liability will make federal officials timid in carrying out their official duties, and that effective government will be promoted if officials are freed the costs of vexations

and often frivolous damages suits." Id. (quoting Westfall v. Erwin, 484 U.S. 292, 295 (1988)).

In Chase, the West Virginia Supreme Court of Appeals adopted the test used by federal courts to determine the applicability of the doctrine of qualified immunity for the acts of public officials. Specifically, the Court employed the standard developed by the United States Supreme Court in Harlow v. Fitzgerald, holding that "government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 362, 424 S.E.2d at 597 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982). The Court explained further that the term "reasonable person" is defined as a "a reasonable public official occupying the same position as the defendant public official." Id. at n. 16,(citing Anderson v. Creighton, 483 U.S. 635 (1987)).

The West Virginia Supreme Court of Appeals specifically extended the applicability of the qualified immunity doctrine to the State Agency for whom the official is employed, stating: "the agency for which the employee or officer worked ordinarily-but not always-enjoys qualified immunity co-terminus with, or of equal effect to, that enjoyed by the officer or employee." Parkulo v. West Virginia Bd. of Probation, 199 W.Va. 161, 177-8, 483 S.E.2d 507, 523-4 (1996). Accordingly, Dr. Denning, the Marshall University Board of Governors and UP&S are shielded from liability because qualified immunity is co-terminus.

The Plaintiff's Complaint alleges various causes of actions. However, it is completely devoid of any allegations of a violation of a specific statute or of a particularized denial of any constitutional right. The Plaintiff has attempted to overcome this defect in his original Complaint by adding allegations of a violation of 133 C.S.R. § 9-12. See Complaint at ¶ 16.

However, this regulation is not applicable because the Plaintiff was not entitled to the benefits of a contract which he breached before the Defendants accepted his resignation before the date he specified. See Complaint at ¶ 13. As such, his Complaint fails to rise to the standard required to defeat the Defendants' entitlement to qualified immunity.

Dispositive motions filed on behalf of governmental defendants which, as is the present case, implicate numerous immunities require unique consideration. "Immunities under West Virginia law ***are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.***" Hutchinson v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996) (emphasis added). Indeed "[t]he very heart of the immunity defense is that ***it spares the defendant from having to go forward with an inquiry*** into the merits of the case." Id. (emphasis added.) Citing Swint v. Chambers County Commission, 514 U.S. 35 (parallel citations omitted) (1995). As Justice Cleckley in Hutchinson wrote:

> As assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune – a trial – will absent a pretrial ruling occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based upon immunity does not lead to a loss of right that cannot be corrected on appeal.

Id. at note 13.

Similarly, the United States Supreme Court used almost identical reasoning to that of Justice Cleckley in Hutchinson to guide the federal judiciary as to the importance of a government official's right to be summarily dismissed from litigation when qualified immunity is applicable. Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). "The privilege of

immunity from suit is an immunity rather than a mere defense to liability, and like absolute immunity ***it is effectively lost if a case is erroneously permitted to go to trial.***" Id. (emphasis added). Further, Saucier holds that immunities spare governmental defendants from the other burdens of litigation. Id. Other burdens of litigation have been held to include discovery. See Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1185 (10th Cir. 2001). Therefore, the Defendants should not be subjected to the burdens of litigation because they are entitled to qualified immunity, and the State defendants are entitled to the same qualified immunity as Dr. Denning.

B. The Plaintiff has failed to state a claim upon which relief may be granted.

The Plaintiff has alleged claims for breach of contract, negligence, and tortious interference with contract. First, the Plaintiff's claims for a breach of contract cannot be maintained because his November 17, 2004 letter of resignation was a breach of any employment contracts he may have had with the Defendants.

> The general rule in cases of anticipatory breach of contract is that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue any of three remedies: he may treat the contract as rescinded and recover on *quantum merit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing.

Syl. Pt. 1, Annon v. Lucas, 155 W.Va. 368, 185 S.E.2d 343 (1971).

The allegations in the Complaint show a breach on the part of the Plaintiff and the Defendants treating it as rescinded. Simply, the Plaintiff cannot offer his resignation in violation of his agreement, and then complain that the Defendants accepted it before he was ready. The Plaintiff alleges he had a contract with the Defendants which was to run until June 30, 2005. He admits that he offered a letter of resignation that was to be effective on December 31, 2004. By the Plaintiff's own allegations, the Defendants simply rescinded the employment contract. Therefore, the Plaintiff's claims for breach of contract cannot survive. Likewise, the Plaintiff's claims for tortious interference with a contract cannot be sustained because the Defendants rescinded the contract based on the Plaintiff's own breach. The Plaintiff's own actions were those that led to the Defendant's actions, not any tortious interference with a contract.

The Plaintiff's allegations for negligence ignore the Defendant's entitlement to qualified immunity. Furthermore, the claims are based solely on the information contained on its website. The website has a clearly posted site disclaimer which states:

> Information on the Marshall University Joan C. Edwards School of Medicine Web site is provided by faculty, staff, students and organizations. Although we strive to keep our Web information accurate and up-to-date, we cannot always guarantee accuracy.. The School of Medicine is not to be held responsible for errors or omissions in information provided via the Web site. Visitors to the School of Medicine site are responsible for contacting the appropriate person/department to verify information and should not rely on the information contained within the site.

It also states that "[t]he School of Medicine will investigate all complaints involving personal Web pages and will remove or block material or links to material that violate federal or state law or University policy."

These claims are novel claims. There is no authority to file suit for the failure to immediately remove an individual from a web site listing. The website information is similar to that of an informational brochure or directory. The Defendants could not be expected to withdraw every informational brochures in circulation that contain the Plaintiff's name. Likewise, the Defendants cannot be expected to change every phone book each time a faculty or staff member leaves their employ. The correct remedy for this alleged violation is the remedy provided in the disclaimer—To remove the Plaintiff's information from the website. Now that the Plaintiff has pointed out its inaccuracy, the Defendants will take steps to remove the requested listing. Therefore, the Plaintiff has failed to state a cause of action upon which relief may be granted.

C. If the Plaintiff is alleging that he breached the contract because the Defendants had failed to provide the benefits due him under the contract, then the Complaint must be dismissed because he failed to exhaust his administrative remedies.

The Plaintiff argued that the reason he breached the contract with the Defendants was because the Defendants' "failure to perform material obligations under their contract[.]" Complaint at ¶ 13. The Plaintiff then goes on to allege the Defendants violated Title 133 of the Code of State Regulations. See Complaint at ¶¶ 15-16. First, the Plaintiff fails to recognize the dictates of 133 C.S.R. 9-8.1, which states:

> A faculty member desiring to terminate an existing appointment during or at the end of the academic year, or to decline re-appointment, shall give notice in writing at the earliest opportunity. Professional ethics dictate due consideration of the

institution's need to have a full complement of faculty throughout the academic year.

Under this section, professional ethics of the Plaintiff dictates due consideration of the institution's needs to have a full complement of faculty throughout the academic year. The Plaintiff resigned in the middle of the academic year, completely ignoring the institution's needs.

133 C.S.R. § 9-16.1 provides: "Each institution may provide alternative procedures to those set out in W. Va. Code §29-6A for the resolution of conflicts." This section gives the institution the option of adopting alternative procedures to the formal grievance procedure set forth in W. Va. Code § 29-6A. If the institution does not adopt an alternative procedure, then the formal grievance procedure outlined in W. Va. Code § 29-6A is available, including a challenge to his dismissal. The Defendants have the so-called "Green Book", which outlines the rights and obligations of the Plaintiff in seeking an administrative remedy. The Plaintiff did not avail himself of this administrative procedure.

The failure to exhaust administrative remedies deprives this Court of subject matter jurisdiction. See Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819 (2001) (exhaustion of administrative remedies is required even if the administrative remedy will not provide the relief sought by the claimant).[2] As such, the Plaintiff's failure to avail himself of the administrative remedies to which he is entitled. Failure to do so deprives this court of subject matter jurisdiction. The West Virginia Supreme Court of Appeals recently noted:

> "The rule of exhausting administrative remedies before actions in courts are instituted is applicable, even though the administrative agency cannot award damages[,] if the matter is within the jurisdiction of the agency." Syl. Pt. 3, Bank of Wheeling v. Morris Plan Bank & Trust Company, 155 W.Va. 245, 183 S.E.2d 692 (1971).

[2] In the context of tort claims against the United States, administrative prerequisites to filing suit have been held to be jurisdictional. McNeil v. United States, 508 U.S. 106 (1993).

Syl. Pt. 4, State ex rel. Smith v. Thornsbury, 214 W.Va. 228, 588 S.E.2d 217 (2003). Here, the West Virginia Education and State Employees Grievance Board has the authority to award certain damages of which the Plaintiff complains. The Court ruled that the Circuit Court lacked subject matter jurisdiction over the claim because the Plaintiff had failed to exhaust its administrative remedies. Id. at 233, 588 S.E.2d 222. Therefore, the Plaintiff's Complaint must be dismissed for his failure to exhaust administrative remedies.

RULING

The Plaintiff has named David A. Denning, M.D. in his individual capacity and the Marshall University Board of Governors and UP&S in this action. All Defendants are entitled to qualified immunity from suit because these Defendants have not violated a specifically identified statute. Next, the Plaintiff has failed to state a claim against these Defendants upon which relief may be granted. He admits that he breached the contract before the breach he alleges by the Defendants. Finally, the Plaintiff has failed to exhaust his administrative remedies, thus depriving this Court of subject matter jurisdiction. Therefore, this Court must dismiss this action.

Therefore, the Defendants' Motion to Dismiss is **GRANTED**.

This action is ***DISMISSED WITH PREJUDICE AND ON THE MERITS***.

This is a final Order. The Clerk of this Court shall forward a copy of this Order to all counsel of record and remove it from the docket of this Court.

Enter this 23rd day of May, 2007.

JUDGE DAVID M. PANCAKE

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, DONNA J. BOGGS, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND STATE AFORESAID, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON MAY 24 2007.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS MAY 24 2007
CIRCUIT CLERK OF CABELL COUNTY, WEST VIRGINIA

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